Melaka Farm Resorts (M) Sdn Bhd v Hong Wei Seng

HIGH COURT (MELAKA) — APPEAL NO 16–3 OF 2002
LOW HOP BING J
2 NOVEMBER 2004

Contract — Formation — Oral agreement — Employment contract — Whether could be implied by conduct of parties — Breach — Non-payment of salaries — Whether employer to pay arrears due

Labour Law — Employment — Contract of employment — Oral agreement — Whether a contract of service could be implied by conduct of parties — Breach — Non-payment of salaries — Whether employer to pay arrears due

The appellant ('the defendant') had orally agreed to employ the respondent ('the plaintiff') as its general manager in absence of a written contract of employment. The plaintiff later resigned and claimed for RM18,000 as arrears for his salary from November 2001 to July 2002, to which the defendant disputed. The director of labour found for the plaintiff but reduced his claim to RM16,000 on the ground that he had worked for only two days in the last month. Dissatisfied, the defendant appealed against the director's decision. The issues before this court were whether an employment contract existed between the parties and whether defendant should pay the arrears in question.

Held, dismissing the appeal:

(1) A contract of service may be orally entered into, as in here, where the defendant's executive director testified that the plaintiff's monthly salary was RM2,000. Further, a contract of service could also be implied by the conduct of the parties, ie when the defendant allowed the plaintiff to work in the defendant's place of employment and subsequently paying him RM4,000 as salary for two months *viz* September and October 2001 (see paras 13 and 14).

(2) Being an incorporated company, the defendant would certainly have documented the relevant payments made to the plaintiff, inter alia, his arrears of salary and adduced the same. This, however, was not done. On a balance of probabilities, the defendant has failed to discharge the burden of proof that it had paid the plaintiff the arrears claimed (see para 18).

[**Bahasa Malaysia summary**

Perayu ('defendan') telah bersetuju secara lisan untuk menjawat responden ('plaintif) sebagai pengurus besarnya tanpa suatu kontrak perkhidmatan bertulis. Plaintif kemudiannya telah meletak jawatan dan menuntut RM18,000 sebagai tunggakan gajinya daripada November 2001 hingga Julai 2002, yang dipertikaikan oleh defendan. Pengarah buruh bersetuju

dengan tuntutan plaintif tetapi telah mengurangkannya kepada RM16,000 atas alasan dia hanya bekerja selama dua hari di dalam bulan terakhir. Terkilan dengan keputusan pengarah tersebut, defendan membuat rayuan ini. Isu-isu di hadapan mahkamah ini adalah sama ada suatu kontrak perkhidmatan wujud di antara pihak-pihak dan sama ada defendan harus membayar tunggakan berkenaan.

Diputuskan, menolak rayuan tersebut:

(1) Suatu kontrak perkhidmatan boleh dilaksanakan secara lisan, seperti di sini, di mana pengarah eksekutif defendan telah memberi keterangan bahawa gaji bulanan adalah RM2,000. Juga, suatu kontrak perkhidmatan boleh dimaklumkan melalui perlakuan pihak-pihak, iaitu apabila defendan telah membenarkan plaintif bekerja di tempat kerja mereka dan seterusnya membayar RM4,000 kepadanya sebagai gaji dua bulan, untuk bulan September dan Oktober 2001 (lihat perenggan 13 dan 14).

(2) Sebagai suatu syarikat yang diperbadankan, defendan semestinya telah menyediakan salinan bertulis tentang pembayaran-pembayaran berkenaan yang dibuat kepada plaintif, antara lain, tunggakan gajinya dan memajukan yang sama. Akan tetapi, ini tidak dilakukan olehnya. Atas imbangan kebarangkalian, defendan gagal untuk menyempurnakan beban bukti bahawa ia telah membayar plaintif tunggakan yang dituntut (lihat perenggan 18).]

Notes

For cases on oral agreements, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3242

For cases on contract of employment, 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 796–817

Cases referred to

Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465 (refd)

Guruvammah (F) v Ramasamy (1939) MLJ 110 (refd)

Hontestroom (Overseas) v Sagaporack (Owners) (1927) AC 37 (refd)

Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117 PC (refd)

Legislation referred to

Companies Act 1965 ss 167–172

Contracts Act 1950 ss 9, 10(1)

Employment Act 1955 s 69B(1)

Markhan Singh (Mohd Latip & Associates) for the defendant

Normila Hussain (Zulfiqri Zakaria & Co) for the plaintiff

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant-defendant ('the defendant') against the decision of the senior assistant director of the Department of Labour Melaka ('the director of labour') who had on 29 November 2002 pursuant to s 69B(1) of the Employment Act 1955 ordered that the defendant pay the respondent-plaintiff ('the plaintiff') a sum of RM16,000 being the arrears of salary for eight months from November 2001 to June 2002, together with interest at 8% per annum from the date of judgment to the date of realisation.

Factual Background

[2] The plaintiff's claim against the defendant is for a sum of RM18,000 being arrears of salary from November 2001 to July 2002 in his capacity as the general manager of the defendant at a monthly salary of RM2,000. There was apparently no written contract of service.

[3] The defendant's executive director Man Fak Chin admitted in his evidence that the plaintiff's monthly salary was RM2,000.

[4] On 1 July 2002, the plaintiff gave the defendant a notice of resignation from the defendant's employment.

[5] The questions before the director of labour were:

1. Whether there was a contract of service between the parties? and

2. Whether there were arrears of salary due by the defendant to the plaintiff?

[6] The director of labour held that notwithstanding the absence of a written agreement, there was a contract of service pursuant to which the plaintiff served as the defendant's general manager.

[7] In respect of the second question, the director of labour found no evidence of payment by the defendant to the plaintiff of the arrears of salaries for eight months, and that the plaintiff did not work in the month of July 2002, as a result of which he allowed the plaintiff's claim for arrears of salary amounting to RM16,000 ie for eight months only.

Contract of Service

[8] Mr Markhan Singh, learned counsel for the defendant, submitted that there was no written contract of service between the parties herein, there being no fixed working hours. Secondly, he added that the defendant had made all payments from the office of one KK Hua to the plaintiff's personal account.

[9] Learned counsel for the plaintiff Cik Normila binti Hussain argued for the plaintiff that the plaintiff has been appointed as the defendant's general manager at a monthly salary of RM2,000 at the material time, and

that the plaintiff's claim was justified as there had been no payment by the defendant to the plaintiff.

[10] The issue for determination by me is whether the director of labour was correct in arriving at the aforesaid conclusions.

[11] The question of the existence or otherwise of a contract of service is a question of mixed fact and law.

[12] A contract of service may be express and brought into existence by the parties thereto by way of an execution of a written agreement, expressly setting out the detailed terms and conditions of service. That will remove all doubts as to the existence of a contract under s 10(1) of the Contracts Act 1950 and the parties are able to rely on these terms to establish their rights and obligations thereunder.

[13] A contract of service may also be brought into existence orally. As the parties herein have not executed a written contract of service, it is necessary for me to determine whether a contract of service has been brought into existence orally. In view of the clear evidence of the defendant adduced through its executive director that the plaintiff's monthly salary was RM2,000, it is abundantly clear to me that an oral contract of service has been brought into existence by the parties herein.

[14] Further, a contract of service may also be implied by the conduct of the parties, as e.g. in the instant appeal, where the defendant has allowed the plaintiff to work in the defendant's place of employment and a sum of RM4,000 has been paid by the defendant to the plaintiff as salary for two months *viz* September and October 2001.

[15] Section 9 of the Contracts Act 1950 provides that so far as the proposal or acceptance of any promise is made in words, it is said to be express while the proposal or acceptance of a promise made otherwise than in words is said to be implied.

[16] On the foregoing grounds, I hold that the conclusion of the director of labour that there was a contract of service between the parties herein is correct.

Payment of Salary

[17] The second and final question as to whether the defendant has paid the plaintiff the arrears of salary claimed by the plaintiff is a question of fact to be established by the evidence adduced before him.

[18] The burden is on the defendant as the employer to prove this fact. If at all the defendant has paid the arrears of salary, the defendant being a company incorporated under the Companies Act 1965 would certainly have documented the payments in the form of payment vouchers, pay slips, cheques etc., as the defendant has to prepare annual statutory accounts under Part VI Division I ss 167 to 172 of the Companies Act 1965 and the relevant provisions of the Income Tax Act 1976. The fact that the

defendant has failed to produce the documents evidencing such payments clearly shows on a balance of probabilities that the defendant has failed to discharge the burden of proof.

[19] The director of labour has also made a specific finding of fact that the plaintiff has only worked for two days in the month of July 2002 when he tendered his notice of resignation on 1 July 2002, thereby disentitling the plaintiff to any arrears of salary for the month of July 2002. In my view, this is a reasonable finding.

[20] Further, having regard to the entire evidence adduced before the director of labour, I am of the view that there is sufficient evidence to support his finding of fact on the basis of his audio-visual advantage of seeing and hearing the witnesses before him. He has given satisfactory reasons for his findings, and has not drawn any unreasonable or insupportable inference. In the circumstances, sitting in my appellate capacity, I should be slow or even refuse to interfere with the finding of fact in the court below: see *Hontestroom (Overseas) v Sagaporack (Owners)* (1927) AC 37; *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465 per Gopal Sri Ram JCA; *Guruvammah (F) v Ramasamy* (1939) MLJ 110; and *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117 PC. I therefore uphold the conclusion of the director of labour in relation to this question.

Conclusion

[21] By reason of the foregoing grounds, I hold that the defendant's appeal is devoid of merits and is hereby dismissed with costs. I therefore affirm the above decision of the director of labour.

Defendant's appeal dismissed with costs.

Reported by M Maheswaran